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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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April 7, 1999

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Commissioner Furchtgott-Roth:

Enclosed is a copy of a memorandum I prepared at the request of AT&T Corp. analyzing the serious competitive concerns raised by the proposed mergers between Ameritech and SBC, and Bell Atlantic and GTE. As you will see, the memorandum concludes that these mergers would lessen competition in telecommunications markets and therefore undermine efforts to achieve the objectives of the 1996 Telecommunications Act. I hope you find this analysis of value as you consider the very serious questions of industry consolidation pending before the Commission.

Very truly yours,

Robert H. Bork

Robert H. Bork

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APR - 7 1999

Federal Communications Commission
Office of Secretary

MEMORANDUM

Re: SBC-Ameritech and Bell Atlantic-GTE mergers

Date: April 7, 1999

The proposed mergers between SBC and Ameritech, and between Bell Atlantic and GTE[1] raise two serious antitrust concerns.

First, the mergers will eliminate the imminent prospect of competition between two sets of large incumbent LECs, thus preserving the monopoly power of each.

Second, the mergers will strengthen not only the combined entities' but all LECs' power to exclude competition by discriminatory conduct. By reducing the number of large LECs from six to four, these mergers will drastically reduce the ability of potential entrants and regulators to determine the validity of LECs' claims that market-opening behavior is impossible.

For each of these reasons, the proposed mergers' effect "may be to substantially lessen competition" in the local exchange markets in their regions in violation of Section 7 of the Clayton Act.

I.

The Mergers Will Have the Immediate and Substantial Effect of Eliminating Each LEC as A Competitor In Another's Monopoly Markets.

The LECs have sought to dismiss antitrust objections to their mergers as the product of a "potential competition theory" which, they say, rests on "shaky grounds" doctrinally and is at the "outer limits" of antitrust law. See, e.g., Bell-Atlantic-GTE Application, pp. 26-27. The

[1] For ease of discussion I will refer primarily to the proposed merger between SBC and Ameritech. My analysis and conclusions, however, apply with equal force to the proposed combination of Bell Atlantic and GTE.

LECs' argument ignores the law, antitrust scholarship, and the salient facts about the proposed mergers.

In analyzing the competitive effects of this merger, two key factual points must be borne in mind. First, until February, 1996, SBC and Ameritech each had legally protected monopoly franchises on the provision of local exchange service. Three years later, and despite Congress' evident expectation that competition in the local exchange market would have been well under way by now, SBC and Ameritech still possesses monopoly market shares in the markets for both residential and business local exchange service in their territories.

Second, both the evidence as well as sound principles of economics demonstrate that SBC and Ameritech were highly likely to enter each other's markets. Ameritech, in fact, was in the process of entering SBC's market when the proposed merger was announced, causing the company to abandon independent entry. Quite aside from that undeniable fact, it was objectively likely that Ameritech and SBC would enter each other's territory. The same observation is true of the proposed merger of Bell Atlantic and GTE. Thus, the two mergers under discussion involve the suppression of competition not in two sets of markets but in four.

As the Commission is aware, Ameritech had already announced an intention to enter SBC's St. Louis market, and was actively implementing those entry plans at the time the merger was announced. In particular, (1) On November 6, 1997, Ameritech announced "Project Gateway," an entry plan under which Ameritech would offer packages of local (reselling SBC local service) and long-distance (including the intraLATA interstate traffic) to St. Louis-area residential customers. Doug Abrams, *Ameritech Turf Move in St. Louis a First for a Baby Bell*, The Washington Times, at B8 (Nov. 7, 1997) ("*Ameritech's St. Louis Turf Move*"); (2) Herb

Hribar, President of Ameritech Cellular & Paging Services, stated prior to this merger that Ameritech expected that "over time, the majority of our base of customers [not limited to any segment] will come over to this product." *Spirit of St. Louis Haunts SBC-Ameritech Merger*, *supra*, at B4; (3) Ameritech Executive Vice-President Thomas Richards told Investor's Business Daily that Ameritech was not committed to simply remaining a reseller of SBC services and that Ameritech "wouldn't rule out any scenario in what we might do down the road." *Ameritech Heeds Competition's Call*, *supra*, at A8; and (4) Mr. Thomas stated in his announcement of Project Gateway that "St. Louis is one of the nation's great markets, and this expansion represents a tremendous opportunity for Ameritech to grow through competition." *Ameritech's St. Louis Turf Move*, *supra*, at B8. *See also id.* (statement by Ameritech spokesman Dave Pacholczyk that "[t]he residential market [for bundled services], in our view, is an untapped market"). Although Ameritech now seeks to portray its plans in a far different light, "[s]tatements by a merging company that independent entry is unlikely are generally discounted as self-serving." Antitrust Law Developments (Fourth) at 348.

Moreover, Ameritech was objectively likely to enter SBC's region on a broader scale and SBC was highly likely to enter Ameritech's monopoly market in turn. Ameritech and SBC both acknowledge (indeed stress) that they need to expand beyond their existing geographic markets in order to thrive, and their own affiant (investment analyst Jack Grubman) has concluded that the RBOCs can profitably expand their territories without merging. In particular, in an <u>ex parte</u> letter filed before the Commission, Mr. Grubman stated that SBC has sufficient capital to allow it to enter 30 out-of-region markets *without* having to merge with Ameritech. Grubman <u>ex parte</u>

at 3.[2] In his view, the fundamental difference between an out-of-region entry by SBC itself and merging with Ameritech is only that the unilateral strategy would take a longer time to start generating positive earnings, but he conceded that the go-it-alone strategy would be profitable. Grubman Reply Aff. ¶ 8. Mr. Grubman's analysis thus confirmed that the RBOCs would view entry into other RBOCs' markets as attractive and profitable.

Indeed, Mr. Grubman found that de novo entry would be not only attractive for an RBOC, but necessary as well. He concluded that in the wake of the Telecommunications Act of 1996 ('Act"), SBC "need[s] to undertake significant further out-of-region expansion on a facilities basis in order to address the needs of the new marketplace" and that SBC must enter out-of-region markets if it is to continue to grow. Grubman ex parte at 2 & Att. B. According to Mr. Grubman, without an out-of-region strategy, Regional Bell Operating Companies ("RBOCs") such as SBC "risk losing [their] critical base of customers." Grubman Reply ¶ 4.[3]

Thus, it is clear not only that SBC and Ameritech *could* profitably enter out-of-region markets without merging — but also that they *would* do so because the market forces unleashed by the Act would force them to expand or lose critical revenues. These market forces also would

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[2] Similarly, in testimony before the Illinois Commerce Commission, an SBC executive acknowledged that "the amount of capital required" is not "a hindrance to either party doing it alone . . . . [A] $2-and-a-half-billion incremental capital expenditure over five years is not a material increase to the capital budgets of either company." Tr. 293-295, ICC Docket No. 98-0555 (testimony of James C. Kahan, SBC Senior Vice President for Corporate Development).

[3] Nonetheless, Mr. Grubman maintains that the merger is necessary because SBC and Ameritech shareholders' expectations of "double digit" returns could not be maintained if either company unilaterally embarked on such an out-of-region entry strategy, because the costs of out-of-region entry are significant. Grubman Reply Aff. ¶ 8; Grubman ex parte at 2-3. But no company in a competitive market has a right (or even a realistic expectation) of continuous double-digit returns. Indeed, SBC's and Ameritech's shareholders presumably have grown accustomed to those types of returns because those companies are monopolies. Needless to say, preserving monopoly returns is not, under the antitrust laws, a valid justification for a merger.

push SBC and Ameritech to compete with each other in their core regions. Indeed, as contiguous RBOCs, Ameritech and SBC were each especially well-positioned to enter each other's territories. The RBOCs' perception of the strategic necessity of expansion, coupled with the conceded fact that the RBOCs could profitably expand independently, lead to only one reasonable conclusion: each RBOC would have been objectively likely to enter each other's market in the relatively short term under current market conditions.

In this situation -- i.e. the acquisition by a monopolist of an entity likely to enter under existing market conditions -- well-settled antitrust principles establish that the proposed merger is presumptively anticompetitive and, absent unusual countervailing factors (that do not exist here), should be prevented. To begin with, the undisputable fact that Ameritech had already begun entry into the St. Louis market establishes, in and of itself, that the proposed merger violates section 7 and should be prevented. Section 7 bars any merger where the effect "may be substantially to lessen competition" "in any section of the country." Here, there can be little doubt that the effect of the merger would be to substantially lessen competition in St. Louis, and St. Louis is clearly a non-trivial "section of the country." The merger should be blocked on this account alone.

The proposed merger also runs afoul of basic antitrust principles when viewed in light of its effect on each RBOC's region as a whole. "As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive." Areeda ¶ 701d at 135. In this regard, recognizing the "importa[nce of] preserv[ing] all th[e] significant possibilities of eroding the monopoly," Professor Areeda concluded that as "to holders of significant monopoly power, [t]he acquisition of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant is presumptively anticompetitive." Areeda, ¶ 701d at 136 (emphasis added). Indeed, the "case for condemnation is strongest where [as here] the acquired firm has actually made attempts to enter the monopolist's market." Areeda, ¶ 701d at 135.

Because the concerns raised by this merger are so central to the core purposes of the antitrust laws, the RBOCs' claims that the Supreme Court has "reserved the question of the doctrine's validity in antitrust law" cannot be taken seriously. BA-GTE public interest statement, p. 27. The question that the Supreme Court has in fact reserved is "whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market." United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973) (emphasis added). Having squarely held that section 7 would bar a merger with an "on-the-fringe" entity that might enter an oligopolistic market in the future if prices were raised, and is therefore alleged to have a disciplining effect on behavior in the market, the Supreme Court cannot sensibly be understood to have questioned the application of section 7 in the a fortiori case of an entity that is capable and likely to enter a monopoly market under current price levels. To read Falstaff that way would be to render it nonsensical: if an entity that is likely to enter a concentrated market if prices are raised may be considered to exercise a present effect on market behavior, an entity that is so likely to enter that it would (and has publicly announced an intent to) enter a monopoly market under current market conditions must be presumed to have a substantial present effect on market behavior. Cf. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) (monopolist's acquisition of a potential competitor that had previously tried to enter unsuccessfully when monopolist underbid the entrant held to clearly violate section 7).

Condemnation of these mergers does not raise any of the criticisms that have been raised with regard to some versions of "potential competition doctrine." Judge Richard Posner disparages the idea that a firm on the edge of the market might influence the behavior of existing market participants since it would enter if the market price were higher. Posner, Economic Analysis of Law, section 10.7, at 303. By contrast, as Posner recognizes, "[f]irms that will enter the market in the future even if the price does not rise . . . are better described simply as future competitors" because they raise very different, and less troubling, issues than mere "potential" competitors. Id.

Posner advocates "ignor[ing] potential competitors" because potential competitors "cannot be regarded as equivalent to the firms already in the market" -- i.e., they could not produce the same product or services as existing participants at current market prices (and thus would not enter under existing conditions). But he concludes that "potential competitors whose ability to enter a market is so great that they are competitively equivalent to the firms already in the market" -- i.e., who would find entry attractive at existing price and market conditions -- should be "place[d] in the same product market" as the acquiring firm and mergers involving such entities may properly be condemned. Posner, Antitrust Law: An Economic Perspective, at 124.

Criticisms of the vaporous form of potential competition leveled by Posner and others have no application here. These are: (1) that the potential competition doctrine depends on a highly speculative assumption that the existing oligopoly participants are capable of tacitly colluding to raise prices even higher absent the presence of the potential competitor; (2) that the existence of an entity that is concededly not currently likely to enter but that would enter under higher price levels is speculative and not objectively provable; and (3) that there is no satisfactory method of identifying those entities that are the "most likely" to enter out of a pool of numerous firms outside the market.

1. Because the existing market is monopolistic, the first criticism obviously has no place here. As Professor Areeda pointed out, monopoly markets raise very different issues:

> But when one of the merging firms is a monopolist and the other is a potential entrant into the same market in which the monopolist has its power, anticompetitive concerns are much more realistic. In this case no speculation is needed about the impact of a perceived entrant on an oligopoly whose members must coordinate their behavior. The single firm monopolist is in a position to make unilateral decisions about the risk and impact of new entry and, where other forms of entry deterrence are not promising, use acquisition as an alternative. As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive.

Areeda, ¶ 701d at 135 (emphasis added).

2. As discussed above, Ameritech had announced plans to enter SBC's market, and was objectively likely to do so in any event, under current market conditions. This merger thus does not involve the speculative possibility that an entity that would not enter in the near term might nevertheless enter if prices were raised.

3. Because SBC is undoubtedly a monopolist, the concerns about identifying the "most likely" or "most probable" potential entrants that is often raised with regard to oligopoly situations is properly of far less weight. As Professor Areeda explains (expressly contrasting this situation with that of oligopoly), requiring "proof that a unique and truly probable potential entrant was eliminated . . . seems much too narrow:"

> It will commonly be difficult if not impossible to prove that a firm is a "unique" and "truly probable" potential entrant. And even if it seems clearly to be one of several firms that are "equally probable" potential entrants, it is important to preserve all those

> significant possibilities of eroding the monopoly and to prevent possible reinforcement of the monopolist's position via the assets acquired. Accordingly, we would adopt a relatively severe approach to holders of significant monopoly power. The acquisition of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant is presumptively anticompetitive, unless the acquired firm is no different in these respects from many other firms.

Areeda ¶ 701d at 136. Ameritech easily fits this test: it has the economic capability of entering under current price levels, and is clearly a "more-than-fanciful possible entrant." Its own behavior identifies it as by far the most likely entrant. SBC likewise fits this test vis-a-vis Ameritech. There clearly do not exist "many other firms" that are "no different" from Ameritech or SBC in terms of infrastructure, know-how and economic capability.[4]

Ameritech and SBC are unique among possible entrants into each other's local exchange markets. They are contiguous LECs, and thus have unique expertise, proximate facilities, and strong brand names in at least part of each others' territories. As AT&T has explained in its comments, an incumbent LEC is the entity best positioned successfully to enter other incumbent LECs' markets. As the Commission has found, the provision of exchange services to a broad base of residential and business customers requires an extensive array of complex "back office" order taking, customer care, billing, fulfillment, and related systems that incumbent LECs have already developed to serve their current territories but that no new entrant who does not provide

[4] The distinction between monopolistic and oligopolistic markets finds support in the statutory text as well. Section 7 prohibits mergers where "the effect of such acquisition may be to <u>substantially lessen competition</u>, or to <u>tend to</u> create a monopoly." 15 U.S.C. § 18. In other words, whereas the statute appears to require the plaintiff to prove with regard to oligopoly markets that the effect of the challenged "merger may be to <u>substantially</u> lessen competition," with regard to monopoly markets the plaintiff need only show that the merger would "tend" to create or perpetuate the monopoly. Recognizing the vital importance of fostering any non-fanciful possibility for breaking a monopolist's hold on a market, Congress condemned mergers with monopolists without imposing any requirement that the effect of the merger on competition in that market need be demonstrably "substantial."

local exchange service would have. *BA-NYNEX Merger Order* ¶¶ 106-08. Moreover, an incumbent LEC would clearly have unique knowledge and understanding of the technical and operational requirements for effective local exchange entry. Finally, as the Commission has found, an incumbent LEC brings "particular expertise to the interconnection negotiation and arbitration process because of its intimate knowledge of local telephone operations," and is thus most likely to secure favorable terms and conditions for leasing an in-region incumbent's network elements. *Id.* ¶ 107.

The comparative advantages possessed by so-called out-of-region incumbent LECs over other entrants are particularly obvious where the two incumbent LECs serve adjoining territories, which is true with respect to both the Ameritech - SBC, and Bell Atlantic - GTE mergers. In particular, each incumbent LEC has deployed already numerous switches in its territory that it could readily use to serve adjoining territories that are within 125 miles of its switches. It could use these existing facilities to provide service far more rapidly than other conceivable entrants. Similarly, adjoining LECs such as Ameritech will have established a brand name with high recognition in territories of contiguous LECs such as SBC. In fact, Ameritech's own research apparently has demonstrated that it has such high brand recognition in SBC's adjoining market that Ameritech was one of the "top two" telecommunications brand names among consumers in that market. Stephanie Mehta, *Industry Focus: Spirit of St. Louis Haunts SBC-Ameritech Merger Plan*, Wall St. J., at B4 (June 8, 1998) ("*Spirit of St. Louis Haunts SBC-Ameritech Merger*").

Moreover, it is particularly desirable to encourage RBOC-on-RBOC competition. RBOCs are in the best position to negotiate favorable interconnection agreements with other RBOCs, because they know best the ways in which competitive entry can be frustrated by the incumbent and would seek terms that would address those problems. Other entrants would then have the right to obtain those same terms under the Act. 47 U.S.C. § 252(i). The loss of this type of competitor is thus a unique loss, and would not be offset by the existence of a remaining two or three RBOCs. Multiple future entrants are likely to pursue different potential strategies for breaking into the formidable RBOC monopolies. Today, it is difficult to predict with any confidence which if any method will succeed. It is thus imperative that all substantial future competitors -- especially those with the clear potential to succeed as the RBOCs do -- should be preserved.[5]

By eliminating by far the most likely entrants into four monopoly markets, these mergers would postpone indefinitely the appearance of the competition Congress desires, frustrating both section 7 of the Clayton Act and the 1996 Telecommunications Act. The mergers should be condemned on this ground alone.

II.

The Proposed Mergers Are Anticompetitive for the Additional Reason that They Will Strengthen these LECs' Ability to Engage in Exclusionary and Discriminatory Conduct.

The proposed mergers will have substantial anticompetitive effects by increasing the RBOCs' ability to engage in exclusionary and discriminatory conduct. With the further decline in the number of large LECs -- now from six to four, if the mergers go through -- there will be

[5] For this reason, AT&T's acquisition of TCI, as well as its partnership with Time Warner, do not diminish the anticompetitive effect of the proposed LEC mergers. The ultimate success of those entry plans, which depend on the development, deployment and marketing of novel technologies, will take extensive time, cannot be regarded as assured even then, and do not compensate for the loss of other significant competitors. Given the uncertainty that necessarily attends such a venture by a non-LEC, AT&T cannot be counted as equivalent to a contiguous LEC.

fewer benchmarks that antitrust plaintiffs and regulators can use to detect and prove that the RBOCs are discriminating against would-be entrants.

Benchmarks play a vital role in defeating discriminatory and exclusionary conduct by an incumbent LEC, in at least two ways. First, they can show that something one RBOC claims is technically infeasible can in fact be done (because another RBOC is doing it). Second, regulators can calculate the average costs of providing a particular type of access or interconnection based on the submissions of numerous LECs, and then identify outliers -- RBOCs that are charging substantially higher than the average while claiming that their charges are related to costs.

Benchmarks are particularly important in the telecommunications industry -- an industry which has a history, going back to the Bell System, of making sham technical claims to frustrate competitors, and of using accounting and other tricks to inflate costs and prices so as to make competition infeasible. Those tactics were often successful precisely because of the enormous information disadvantage faced by competitors and regulators. It was very difficult, if not impossible, for competitors without access to the data, and regulators who did not have the resources to conduct constant technical studies and financial audits, to prove that the carriers were acting in bad faith. Benchmarks provide one important means of addressing that problem.

The importance of benchmarks is not a matter of mere theory or conjecture. Since passage of the 1996 Act, benchmark examples set by particular RBOCs have been indispensable in exposing discriminatory and unjustified exclusionary conduct undertaken by the others. The following is a list supplied to me by AT&T of the more salient examples. In assessing this list one should bear in mind how many more potential exclusionary strategies were likely deterred ab initio by the knowledge that, given the RBOCs' inability to coordinate positions, the potential discrimination would have been exposed as pretextual:

1. Shared Transport. Ameritech has for some time now challenged efforts by new entrants to purchase shared transport as a network element. As one of a number of justifications for this refusal, Ameritech claimed that its switches were unable to measure usage of shared transport trunks, or to identify such usage by carrier, and that accordingly there was no technically feasible way for it to bill users for shared transport. In its negotiations with Ameritech and in pleadings before the state commissions and the FCC, AT&T was able to point to the fact that other ILECs -- specifically, Bell Atlantic, NYNEX (pre-Bell Atlantic merger), Southwestern Bell, Pacific Bell (before the SBC merger) and BellSouth -- had agreed to offer shared transport as proof that Ameritech's claims were false and pretextual. Partly in reliance on the benchmarking proof, every state commission and the FCC ordered Ameritech to provide shared transport. Indeed, in ordering access to shared transport the FCC found that "Ameritech is the only party to contend that it is not currently able to measure and bill for shared transport. In contrast, Bell Atlantic, NYNEX, and PacTel have stated that they offer shared transport in conjunction with unbundled local switching." Third Order on Reconsideration, Local Competition, 12 FCC Rcd. 12460, 12477 n.77 (1997).[6]

[6] Second Entry On Rehearing, PUCO Case No. 96-922-TP-UNC, para. 7 (Ohio PUC November 6, 1997); March 19, 1998 Entry, PUCO Case No. 96-922-TP-UNC, para. 3 (Ohio); October 22, 1998 Order On Rehearing, 96-922-TP-UNC (Ohio); Order on Rehearing, pp. 12-21, In re UNE TSLRIC Proceeding, Case No. U-11280 (Mich. PSC, Jan 28, 1998); Order in Cause No. 40611, p. 47 (Indiana Utility Regulatory Commission, June 30, 1998).

2. Access Billing. At various times since passage of the 1996 Act, SBC (and Ameritech) had insisted that they could not provide CLECs who use the unbundled switch the records they need to bill for terminating access or for originating toll free access. In fact, SBC took the position that its inability to provide such records entitled it to continue billing for these services and keeping the substantial revenue for itself that would otherwise have been earned by the CLEC. In contrast, not only did Bell Atlantic agree to provide these records to the CLECs but even agreed to an interim arrangement on estimating usage until it completed the development necessary to segregate the usage, and AT&T successfully tested this capability with Bell Atlantic in Pennsylvania. In its negotiations and arbitrations, AT&T successfully pointed to Bell Atlantic's ability to provide access billing records as proof that SBC and Ameritech's technical claims were false. As a result the incumbent LECs have now widely either agreed, or been ordered, to permit the CLECs to bill for access and to provide the usage records necessary for that purpose.[7]

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[7] See Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic. . ., Illinois Commerce Commission Docket Nos. 96-0486/96-0569 (Consol.), Second Interim Order, February 17, 1998, at p. 115: "The Commission also rejects Ameritech's concerns as to the technical feasibility of providing billing information to CLECs in order for them to bill IXCs for terminating access under Staff and intervenors' definition of common transport. The Commission agrees with AT&T and MCI that it is indeed technically feasible for Ameritech to provide information to CLECs on a daily and monthly basis sufficient to allow UNE subscribers to bill IXCs terminating carrier access charges. The Commission finds it quite instructive that many other RBOCs have voluntarily agreed to or have been ordered by state commissions to provide such information." See also Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company, Docket No. 16226, Order, (Tex. PUC Sept. 30, 1997) at Appendix B, pp. 1, 5; Order Approving Implementation Schedule (Tex. PUC Mar. 17, 1998) at Attachment A, p. 24 ("AT&T should not be required to wait until 3/99 for SWBT to develop the capability to record terminating access and 800 originating access").

3. Mechanized Loop Testing (MLT). In its section 252 negotiations, SBC insisted that it was technically infeasible to provide CLECs with MLT capabilities when the CLEC uses the unbundled switch. SBC offered instead to give CLECs only a second class testing capability that would have created unnecessary customer outage, cost more, and provided no preventative test capabilities. AT&T argued in arbitration in every SBC state that SBC's "technical feasibility" argument was pretextual because Bell Atlantic and BellSouth, who both use the same switch technology as SBC, were able to provide CLECs with mechanized loop testing capability, and that it thus could not be a technical impossibility for SBC. As a result, SBC lost this issue in arbitration and has been required to provide MLT in at least two states (Texas and Missouri).[8]

4. Cageless Collocation. In its negotiations, Bell Atlantic insisted that for security reasons it absolutely could not provide cageless collocation, and that providing cageless collocation would raise significant risks to the integrity of its network. COVAD, in the recent collaborative hearings in New York, pointed to US West as the model ILEC with respect to this issue. COVAD presented proof that it is currently operating in many U S West central offices in the state of Washington with equipment that was installed in a cageless arrangement. COVAD still

[8] Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company, Docket No. 16226, Order, (Tex. PUC Sept. 30, 1997) at Appendix B, pp. 10-11; Order Approving Implementation Schedule (Tex. PUC Mar. 17, 1998), at Attachment A, pp. 13, 15. See also Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market, Project No. 16251, Final Staff Status Report on Collaborative Process (Tex. PUC Nov. 18, 1998)("Staff concurs that the quality of loop and port UNEs when combined by a CLEC will not be in parity with SWBT-combined loop and port, if access to MLT is not available."); AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Case No. TO-98-115, Report and Order (Mo. PSC Jan. 2, 1998), at pp. 21-22.

retains the right to maintain its own equipment (as opposed to a cageless virtual collocation arrangement) and neither it nor US West have experienced any of the security problems predicted by Bell Atlantic. As a result, the New York Commission prodded Bell Atlantic to offer a compromise form of cageless collocation, which requires an escort for the CLEC technician.[9] Similarly, in its recent Notice of Proposed Rulemaking to implement section 706 of the Act, the FCC tentatively concluded that it should require incumbent LECs to provide cageless collocation, noting that "U S WEST is currently offering a cageless collocation arrangement." NPRM, ¶¶ 137, 139, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147 (released Aug. 7, 1998). In its subsequent Order, the Commission then imposed this requirement. See First Report and Order and Further NPRM, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 ¶¶ 42-43 (rel. March 31, 1999).

5. Collocation of Remote Switching Modules (RSM). In its negotiations with numerous ILECs, AT&T has sought the right to access the unbundled loop by the often more efficient method of collocating a remote switching module. Bell Atlantic took the position that collocation of RSMs was infeasible because RSMs would use up too much space and would prevent other CLECs from collocating. Bell Atlantic also stated that the unique grounding requirements of an RSM would require extensive central office modification. AT&T successfully demonstrated that both these positions were pretextual by demonstrating that in its arbitration in Texas SBC had stipulated that it would allow CLECs to collocate RSM for access to the unbundled elements

[9] Opinion No. 98-18, pp. 20-23, Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements, Docket No. 98-C-0690 (New York PSC Nov. 23, 1998).

without any restrictions on the equipment. As a result, AT&T argued for and won this right during the arbitrations in every Bell Atlantic state except one (Virginia).[10]

6. Selective routing of operator services and directory assistance. In its negotiations with AT&T, SBC insisted that when a CLEC used its unbundled switch or offered service through resale it could not selectively route the CLEC's operator and directory assistance traffic to the CLEC's own operator centers. SBC claimed that such selective routing was technically infeasible. AT&T, however, was able to get agreement from Bell Atlantic in the Pennsylvania pre-arbitration conferences to perform the selective routing AT&T needed. With Bell Atlantic's stipulation as evidence, AT&T successfully obtained SBC's commitment to undertake the development necessary to perform the required selective routing.[11]

7. Interim Number Portability. In its negotiations with Bell Atlantic, AT&T asked Bell Atlantic to provide two methods of implementing its interim number portability obligations known as Route Indexing-Portability Hub ("RIHP") and Directory Number Route Indexing ("DNRI"). Bell Atlantic, however, claimed for months that implementing those solutions would require very complicated, time-consuming and costly translations in its switch, and that it should therefore not be required to implement them. AT&T was finally successful in exposing those claims as pretextual by arranging to have a representative of BellSouth, which had agreed to

[10] See, e.g., Opinion and Order Resolving Arbitration Issues, Opinion No. 96-31, Cases 96-C-0723 and 96-C-0724 (NY PSC Nov. 29, 1996).

[11] Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company, Docket No. 16226, Arbitration Award (Tex. PUC Nov. 7, 1996), at p. 5; Attached Stipulation at 1.

implement those methods, contact Bell Atlantic and describe the five simple steps for performing the required translations.[12]

8. Number Portability Tariff Investigations. Pursuant to their duties to implement long term number portability, the various RBOCs submitted tariffs that specified the charges they would impose on CLECs for number portability implementation. In designating aspects of those tariffs for investigation, the Commission expressly relied on benchmarking evidence. Specifically, the Commission designated for investigation Bell Atlantic's imposition of a "transport component" that substantially increased the query charges it imposed, noting "no other carrier includes such a component or establishes different rates for Tandem and End Office queries." Similarly, the Commission designated for investigation Pacific Bell's and Southwestern Bell's imposition of "non-recurring" charges that were nevertheless imposed on a monthly basis, noting "that no other carrier has proposed similar charges." Order Designating Issues for Investigation, ¶ 9, Number Portability Query Services, CC Docket No. 98-14 (released June 17, 1998).

9. FCC Local Competition Order. Finally, the Commission has placed great weight on benchmarking in implementing the local competition requirements of sections 251 and 252. In particular, in its Local Competition Order the Commission concluded that "successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible

[12] Affidavit of Penn Pfautz on Behalf of AT&T Communications of Maryland, Inc., Maryland 271 Investigation, Case No. 8751 (Maryland PSC, filed Apr. 11, 1997).

. . . at substantially similar points in networks employing substantially similar facilities." Local Competition Order, ¶ 204.

Obviously, fewer RBOCs means that there will be fewer opportunities for one RBOC to break ranks with the others on claims of technical feasibility, fewer observation points through which to create robust average data, and less fear on the part of the remaining RBOCs that if they assert a sham basis for denying access or interconnection, that basis will subsequently be exposed as pretextual.[13] As a result, the mergers will make it much more likely that these LECs will engage in anticompetitive conduct that will be more difficult to detect and prove.

The loss of independent benchmarks would be a direct effect of the proposed mergers, and could not otherwise lawfully occur. An agreement by two or more RBOCs -- say SBC and Ameritech -- that each would adopt the groundless position that a particular form of access or interconnection was technically infeasible would clearly violate the antitrust laws. It would be an "agreement" or "conspiracy" "in restraint of trade" violative of section 1 of the Sherman Act and would probably violate section 2's prohibition of attempted monopolization by blocking entry to each party's monopoly market. There is no conceivable efficiency created by such an agreement, only an exclusion of competitors, and it would, I believe, be illegal per se under Sherman 1 and virtually so under section 2. I know of no authority for the proposition that an agreement between independent entities with the purpose or effect of restraining trade would be

[13] This was demonstrated mathematically before the Commission in Farrell and Mitchell, "Benchmarking and the Effects of ILEC Mergers" (appended to Petition to Deny of Sprint Communications Company L.P., In re Applications of Ameritech Corp. and SBC Communications Inc., CC Docket No. 98-141 (filed Oct. 15, 1998)).

exempt from the prohibitions of sections 1 and 2 simply because the parties to the agreement do not presently compete with each other.[14]

Nor would such an agreement be saved by the Noerr-Pennington doctrine. First, there is more than a simple agreement on a common legal defense. Instead, the agreement is to refuse a would-be competitor's request for a particular form of interconnection and then lie about its technical feasibility in a legal proceeding. The law's interest in promoting the free flow of information to governmental bodies is not enhanced but defeated. Noerr-Pennington offers no protection whatever to such a sham. See generally Areeda, ¶ 204 (main text) and ¶ 204.1a (1996 Supp.) As Areeda's treatise points out, "[f]ar more serious [as sham litigation] than the lawsuit whose legal theories are manifestly unreasonable is the lawsuit based on false allegations of fact whose truth is not readily discoverable by the defendant in that suit. . . . Indeed, the greater the likelihood that the true facts will never be known, the more the likelihood the dominant firm will resort to this type of lawsuit as a device for perpetuating or creating monopoly." Areeda, ¶ 205 at 217.

The RBOCs have offered no serious response to complaints that the proposed mergers will have anticompetitive consequences by reducing the vitally important ability of regulators and competitors to employ benchmarking. The RBOCs have claimed that the merger will not diminish the possibility of benchmarking because each BOC is a separate state entity that will continue in existence and whose conduct will remain available as a basis for comparison.

[14] This analysis is supported by Areeda. He confirms that where, as here, the two companies in different markets have an "incentive to present a unified front," and there arises a "limitation on competition made possible by the consultation," the agreement would create an unlawful conspiracy under section 1. Areeda, ¶1402b1, at 13-14.

But this claim is frivolous. Each of the BOCs that today comprise Ameritech and SBC will, after the merger, be a wholly-owned subsidiary of one corporate parent. Obviously, the merged entity's Illinois subsidiary would not knowingly take positions that would undermine claims advanced by the merged entity's California subsidiary. Yet the merged entity's ability to coordinate the positions of currently separate entities to eliminate benchmarking is precisely what renders the proposed mergers anticompetitive.